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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

REGGIE RAY THOMAS,

Defendant and Appellant.

A153853

(Alameda County
Super. Ct. No. 177855A)

Based on his participation in a killing when he was 16 years old, defendant Reggie Thomas was charged with murder in criminal (adult) court. He pleaded no contest to voluntary manslaughter and the allegation that he personally used a firearm, and the trial court sentenced him to an agreed-upon 21 years in prison. On appeal, Thomas contends, and the Attorney General concedes, that he is entitled to a hearing in juvenile court under the Public Safety & Rehabilitation Act of 2016 (Proposition 57) to determine whether he was appropriately charged in adult court. We agree with the parties that it is appropriate to conditionally reverse the judgment and remand the matter for such a hearing.¹ (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 310, 313 (*Lara*).)

Thomas also claims that he is independently entitled to a remand in light of Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill No. 620), which confers discretion on

¹ As the parties observe, the abstract of judgment incorrectly identifies the year in which the offense was committed as 2015 instead of 2012. Depending on the outcome of the transfer hearing, either the trial court or the juvenile court should ensure that the judgment reflects the proper date.

sentencing courts to strike certain firearm enhancements in the interest of justice. We recently held that a defendant convicted by plea who agrees to a specific term for a firearm enhancement may not seek a remand under Senate Bill No. 620 without obtaining a certificate of probable cause. (*People v. Fox* (2019) 34 Cal.App.5th 1124, 1126–1127 (*Fox*), review granted July 31, 2019, S256298; see also *People v. Galindo* (2019) 35 Cal.App.5th 658, 662–663 [adopting *Fox*’s analysis to deny remand for resentencing under Senate Bill No. 1393 (2017-2018 Reg. Sess.)].) After we filed our opinion in *Fox*, our state Supreme Court granted review in two other cases on the issue whether a certificate of probable cause is required to enable a defendant to rely on a retroactive change in the law to challenge a negotiated sentence. (*People v. Stamps* (2019) 34 Cal.App.5th 117, review granted June 12, 2019, S255843; *People v. Kelly* (2019) 32 Cal.App.5th 1013, review granted June 12, 2019, S255145.) Until the Supreme Court resolves this question, we will continue to hew to our decisions in *Fox* and *Galindo*, as well as other decisions requiring a certificate of probable cause under similar circumstances. (See Cal. Rules of Court, rule 8.1115(e)(1).) Because Thomas failed to obtain such a certificate, we decline to grant him relief based on his claim under Senate Bill No. 620.

As a result of our holdings, Thomas is entitled to a hearing in juvenile court for the court to determine, by applying the criteria specified in Welfare and Institutions Code section 707, subdivision (a)(3), whether it would have transferred him to a court of criminal jurisdiction under the current law. If the juvenile court determines that he should remain within its jurisdiction, it shall consider his convictions juvenile adjudications and impose an appropriate disposition. If the juvenile court determines that he was properly treated as an adult, it shall transfer the matter back to the trial court, and his convictions and sentence shall be reinstated.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

The issues on appeal do not require a detailed discussion of the underlying facts. Briefly, on the evening of July 10, 2012, 15-year-old Hadari Askari was shot to death outside an Oakland apartment complex.² Surveillance footage from that night showed an altercation involving several people, after which two people escorted Askari away. Several months later, a person arrested for an unrelated crime volunteered that he had information about Askari's murder and reported that Thomas had confessed to committing the crime. Within the next two years, two other people, including one who was also arrested for Askari's murder, identified Thomas as one of the people who walked away with Askari before Askari was shot.

In February 2016, the Alameda County District Attorney filed an information charging Thomas with one count of murder and alleging that he personally used a firearm during the offense.³ In March 2017, the trial court denied Thomas's motion to transfer the case to juvenile court under Proposition 57.

On September 12, 2017, the day that Senate Bill No. 620 passed in the Assembly and the day before the Senate concurred in the Assembly amendments, Thomas entered a plea of no contest to one count of voluntary manslaughter and the firearm allegation.⁴ He initialed a box on his plea form indicating he waived his "right to appeal from this conviction, including an appeal from the denial of any pretrial motions." On February 7, 2018, a month after Senate Bill No. 620 took effect, the trial court sentenced

² Most facts in this paragraph are taken from the transcript of the preliminary hearing, which Thomas stipulated provided the factual basis for his plea.

³ The murder charge was brought under Penal Code section 187, subdivision (a), and the firearm enhancement was alleged under Penal Code sections 12022.5, subdivision (a) and 12022.53, subdivision (b). All further statutory references are to the Penal Code unless otherwise noted.

⁴ The conviction for voluntary manslaughter was under section 192, subdivision (a), and the firearm enhancement was imposed under section 12022.5, subdivision (a).

him in accordance with the plea agreement to a total term of 21 years in prison, composed of the aggravated term of 11 years for voluntary manslaughter and a consecutive aggravated term of 10 years for the firearm enhancement. Thomas appealed without requesting a certificate of probable cause.

II. DISCUSSION

A. *Thomas Is Entitled to a Transfer Hearing in Juvenile Court.*

Thomas claims that under Proposition 57 he is entitled to a transfer hearing in juvenile court. We accept the Attorney General's concession that the judgment must be conditionally reversed and the matter remanded for such a hearing.

Proposition 57, which was passed and took effect in November 2016, "prohibits prosecutors from charging juveniles with crimes directly in adult court. Instead, they must commence the action in juvenile court. If the prosecution wishes to try the juvenile as an adult, the juvenile court must conduct . . . a 'transfer hearing' to determine whether the matter should remain in juvenile court or be transferred to adult court. Only if the juvenile court transfers the matter to adult court can the juvenile be tried and sentenced as an adult." (*Lara, supra*, 4 Cal.5th at p. 303.) In *Lara*, the Supreme Court held that this aspect of Proposition 57 applies retroactively under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) to juveniles charged in adult court whose judgments were not final at the time the law was enacted. (*Lara*, at pp. 303–304.)

To afford such juveniles the benefit of a transfer hearing, *Lara* approved a procedure under which an appellate court conditionally reverses the judgment and remands for a transfer hearing in juvenile court. (*Lara, supra*, 4 Cal.5th at p. 310.) The hearing is to be conducted, " 'to the extent possible, . . . as though the prosecutor had originally filed a juvenile petition in juvenile court and had then moved to transfer [the] cause to a court of criminal jurisdiction.' " (*Ibid.*) " 'If, after conducting the . . . transfer hearing, the [juvenile] court determines that it would have transferred [the defendant] to a court of criminal jurisdiction because he [or she] is "not a fit and proper subject to be dealt with under the juvenile court law," ' " then the judgment is reinstated. (*Ibid.*) But

“ ‘if the juvenile court finds that it would *not* have transferred [the defendant] to a court of criminal jurisdiction, then it shall treat [the defendant’s] convictions as juvenile adjudications and impose an appropriate “disposition” within its discretion.’ ” (*Ibid.*)

Although it is clear that Proposition 57 applies to Thomas under *Estrada* in that he was charged in adult court and the judgment is not final, we must address whether a certificate of probable cause was necessary to raise this issue on appeal. (See *People v. Miller* (2006) 145 Cal.App.4th 206, 212 [appellate court has duty to consider sua sponte whether certificate required to make appeal operative because goes to court’s own jurisdiction].) Thomas waived his right to appeal “the denial of any pretrial motions,” language that would appear to encompass the trial court’s denial of his motion for a transfer hearing. Thus, it would seem that he needed a certificate of probable cause to raise the Proposition 57 issue. (See *People v. Espinoza* (2018) 22 Cal.App.5th 794, 797 (*Espinoza*).) The Attorney General, however, disclaims any argument that the “appellate waiver and failure to obtain a certificate of probable cause bars the [Proposition 57] issue on appeal.” We construe this disclaimer as a position that the appellate waiver did not contractually encompass the denial of the Proposition 57 motion. As a result, no certificate of probable cause was needed to challenge the waiver.

For a similar reason, we conclude that a certificate of probable cause was also unnecessary to enable Thomas to raise the Proposition 57 issue itself. The People are willing to accept that Thomas will not be sentenced in adult court should the juvenile court conclude that he was not appropriately charged in adult court, so he need not attack the validity of the plea in order to obtain a transfer hearing. As a result, we may consider his Proposition 57 claim despite his failure to obtain a certificate of probable cause, and we agree with the parties that he is entitled to a conditional reversal and remand for a transfer hearing in accordance with *Lara*.

B. Thomas Is Not Entitled to Relief on Either of His Claims Involving Senate Bill No. 620.

Thomas also claims that the matter must be remanded for the trial court to exercise its discretion whether to strike the firearm enhancement. We agree with the Attorney

General that Thomas's failure to obtain a certificate of probable cause prevents us from considering this claim. We also reject Thomas's claim that his trial counsel provided ineffective assistance by not asking the trial court to strike the firearm enhancement at sentencing.

Assuming, without deciding, that Thomas's appellate waiver did not cover his claim under Senate Bill No. 620, we conclude that under *Fox* Thomas still needed a certificate of probable cause to seek a remand on the grounds of that legislation. As did the defendant in *Fox*, Thomas agreed to a specific term for the firearm enhancement in exchange for lessening his overall exposure. (*Fox, supra*, 34 Cal.App.5th at pp. 1127–1128.) And as was true of the *Fox* defendant, nothing prevented Thomas from seeking a certificate of probable cause based on Senate Bill No. 620, which went into effect before he was even sentenced. (*Fox*, at p. 1135.)

Fox also disposes of Thomas's related ineffective-assistance claim. To prevail on a claim of ineffective assistance of counsel, a defendant must show both "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Centeno* (2014) 60 Cal.4th 659, 674.) The first *Strickland* prong requires a defendant to show that "counsel's performance . . . fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) In evaluating this prong, "a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance." (*Ibid.*) " " "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts." ' ' " (*People v. Stanley* (2006) 39 Cal.4th 913, 954.) Because the presumption of counsel's competence can usually be rebutted only with evidence outside the record, a reversal on direct appeal is not warranted unless "(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*Mai*, at p. 1009.)

As we explained in *Fox*, Senate Bill No. 620 does not empower trial courts to strike firearm enhancements while otherwise leaving a negotiated plea intact. “Before sentencing a defendant convicted by plea, a trial court has the authority to withdraw its approval of the plea agreement. [Citations.] But once the court ‘ “has accepted a plea bargain[, it] is bound to impose a sentence within the limits of that bargain. . . . Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly.” ’ [Citation.] In other words, a court is prohibited ‘from unilaterally modifying the terms of the bargain without affording—or after it has become impossible to afford—an opportunity to the aggrieved party to rescind the plea agreement and resume proceedings where they left off.’ ” (*Fox, supra*, 34 Cal.App.5th at p. 1138.)

Thus, the trial court here could not have stricken the firearm enhancement unless the plea bargain was undone, and Thomas’s trial counsel clearly had a valid tactical basis for not seeking that result. It is true that in a letter to the probation department, counsel opined that the negotiated sentence was “unduly harsh” given substantial doubts about the extent of Thomas’s involvement in Askari’s death, including whether Thomas was even the shooter. But counsel also characterized the disposition “as a valid risk management decision by Mr. Thomas, in light of the consequences of a loss at trial.” There is no indication in the record that Thomas would have been inclined to withdraw his plea and face reinstatement of the murder charge on the chance that he could benefit from Senate Bill No. 620. Under these circumstances, counsel could have rationally decided to adhere to his client’s wishes and not seek to undo the plea agreement based on the new law.

The ultimate consequences of our resolution of the Senate Bill No. 620 issue will depend on the result of the transfer hearing. If the juvenile court retains jurisdiction of the case, it will have discretion to determine an appropriate disposition, including whether to strike the firearm enhancement. (See § 12022.5, subd. (c) [authority to strike enhancement “applies to any resentencing that may occur pursuant to any other law”].) Even if the enhancement is preserved, Thomas will face a maximum commitment of far less than 21 years. (See *People v. Vela* (2018) 21 Cal.App.5th 1099, 1105.) But if the

juvenile court determines that Thomas was appropriately charged in adult court, he will not be entitled to have the trial court exercise its discretion whether to strike the firearm enhancement upon the judgment's reinstatement.

III.
DISPOSITION

The judgment is conditionally reversed, and the matter is remanded to the trial court with directions to refer the case to the juvenile court for a transfer hearing under Welfare and Institutions Code section 707. If the juvenile court determines it would not have transferred Thomas to adult court under the current law, it shall treat his convictions as juvenile adjudications and impose an appropriate disposition. If the juvenile court determines it would have transferred him to adult court, then it shall transfer the matter back to the trial court and his convictions and sentence shall be reinstated. In addition, if the judgment is reinstated, the trial court must correct the abstract of judgment to reflect that Thomas committed the crime in 2012, not 2015, and send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

Humes, P. J.

I CONCUR:

Margulies, J.

Concurring and dissenting opinion of Sanchez J.:

I agree with the majority that Thomas’s conviction and judgment should be conditionally reversed and the matter remanded to the juvenile court for a transfer hearing in accordance with the Public Safety and Rehabilitation Act of 2016 (Prop. 57). In determining whether Thomas should remain under juvenile court jurisdiction or be transferred to adult criminal court, the juvenile court is guided by several statutory factors, including the minor’s age and maturity, the seriousness of the offense and his degree of involvement in it, any history of delinquency and childhood trauma, and the minor’s potential for rehabilitation under juvenile court supervision. (Welf. & Inst. Code, § 707, subd. (a)(3).) Should the juvenile court retain jurisdiction over Thomas, it may fashion an appropriate disposition that has, as its primary focus, the rehabilitation of the minor. (See *People v. Vela* (2017) 11 Cal.App.5th 68, 80.)

If, on the other hand, the juvenile court determines that Thomas should be transferred to adult criminal court, the majority concludes that his negotiated sentence—11 years for voluntary manslaughter and a consecutive 10-year term for a firearm enhancement—must be reinstated. I respectfully disagree and would hold that under Senate Bill No. 620 (Stats. 2017-2018 Reg. Sess.), Thomas is separately entitled to a resentencing hearing at which the trial court may exercise its discretion whether to strike or dismiss his firearm enhancement in the interests of justice. (See Pen. Code, § 12022.5, subd. (c).)

As explained in my dissenting opinion in *People v. Fox* (2019) 34 Cal.App.5th 1124, review granted July 31, 2019, S256298 (*Fox*), our Supreme Court has held that a plea agreement in California “will be ‘ “deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy.” ’ ” (*Id.* at p. 1144, quoting *Doe v. Harris* (2013) 57 Cal.4th 64, 66 (*Doe*).) Where, as here, the Legislature has enacted an ameliorative change in criminal law and intended for that law to extend as broadly as possible to all nonfinal judgments of conviction, “requiring the parties’

compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement” (*Doe*, at p. 73; see *Fox*, at pp. 1147–1151 (dis. opn. of Sanchez, J.)). No certificate of probable cause was required to maintain Fox’s appeal because he was not challenging the validity of his plea. He was instead seeking to obtain the benefits of Senate Bill No. 620, which altered and added to the terms of the parties’ plea agreement. (See *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1078–1079 [defendant’s appeal which sought remand for a juvenile transfer hearing under Prop. 57 and resentencing under Sen. Bill No. 620 did not require a certificate of probable cause because both changes in law were implicitly incorporated into his plea agreement].) The same holds true for Thomas.

Although the parties to a plea bargain might affirmatively agree to fix the terms of an agreement despite subsequent amendments to the relevant law (*Doe, supra*, 57 Cal.4th at p. 71), the record here is devoid of any indication that the parties intended to insulate their plea agreement from the effects of Senate Bill No. 620. Indeed, no mention was made of Senate Bill No. 620 either at the hearing in which Thomas entered a plea of no contest or at Thomas’s sentencing hearing. (See *Doe*, at p. 71 [“[P]rosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law.”].) And although the majority contends that the trial court may not unilaterally modify the terms of the bargain without affording the aggrieved party a chance to withdraw from the agreement, numerous courts, including our Supreme Court, have held otherwise. (See *Fox, supra*, 34 Cal.App.5th at pp. 1153-1154 [discussing cases].) Parties to a plea deal understand that sometimes they must bend to the will of the Legislature, even if such changes in law work a detriment on one party or the other.

Accordingly, I would hold that Thomas was not required to obtain a certificate of probable cause to seek appellate relief under Senate Bill No. 620, and if transferred to criminal court, he should be resentenced in accordance with Penal Code section 12022.5, subdivision (c).

Sanchez, J.

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